ORIGINAL

No. 95-1598

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA -- Petitioners

VS.

ERNEST EUGENE HARPER -- Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis.

[X] Respondent has previously been granted leave to proceed in forma pauperis in the following court(s): United States District Court for the Northern District of Oklahoma and United States Court of Appeals for the Tenth Circuit.

[ ] Respondent has **not** previously been granted leave to proceed in forma pauperis in any other court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Ernest E. Harper
ERNEST EUGENE HARPER, Pro se

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24 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Ernest Eugene Harper, am the Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ✓ No___

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. $24.00 - Jacks Crabtree Correctional Center Rt. 1, Box 8, Helena, Oklahoma - 73741

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes___ No ✓

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or have a checking or savings account? Yes ✓ No___

a. If the answer is yes, state the total value of the items owned. Mandatory Prison Saving Account $322.40

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes___ No ✓

a. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4-16-96, 1996.

Ernest E. Harper

Ernest Eugene Harper, Pro se

No. 95-1598

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA -- PETITIONERS

VS.

ERNEST EUGENE HARPER -- RESPONDENT

Brief In Opposition To Petition
For a Writ of Certiorari

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERNEST EUGENE HARPER
Route 1 Box 8
Helena, Oklahoma 73741-9606

QUESTION(S) PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his participation in a supervised release program that allowed convicts to work and reside in society beyond the confines of a state penal institution and are thus free to enjoy most of the benefits of a normal life.

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STATEMENT OF THE CASE

Respondent, an inmate in the Oklahoma Department of Corrections, appearing pro se, challenged the constitutionality of the process by which he was terminated from the Preparole Conditional Supervision Program (the Program), a supervised release program similar to, although more restrictive than, parole that allows convicts to live and work in society. Those in the Program enjoy the freedom to be gainfully employed, to be with family and friends, and to form the other enduring attachments of normal life. Those who are selected to participate in the Program are chosen by the Oklahoma Pardon and Parole Board. Program participants are allowed to live and pursue studies or work outside correctional facilities under the close supervision of a parole officer. The Program required participants to have a home sponsor, maintain employment or pursue an education, refrain from drugs and alcohol, obtain approval before leaving their county of residence or buying a car, and obey all applicable Department of Corrections regulations. Violation of a condition may result in termination from the Program and a return to incarceration.

The Petitioners do not dispute that Respondent violated no rules or conditions of the Program; that he was removed from the Program because he was denied parole by the Govenor. Nothing in the rules or regulations governing the Program mandated that result. The regulations likewise contained no language suggesting that participants may be terminated "at

will" upon the denial of parole. The Petitioners do not here contend either that Respondent was terminated from the Program because of ineligibility.

Petitioners do not dispute that Respondent received verbal notice, by phone, of his renewed incarceration somewhat less than five hours before he was to turn himself in to authorities and that he was never granted any sort of hearing at which he could present evidence of any kind. The Petitioners do not here contend that Respondent received any of the other procedural safeguards required by due process or that he was afforded the less comprehensive process deemed necessary by the Court of Criminal Appeals in Harper v. Young, 852 P.2d 164 (Okla.Crim.App. 1993). Pet. App. at 40a.

A. TRIAL COURT PROCEEDINGS.

The Petitioners misstated the facts, in 1992, the Respondent, Ernest Eugene Harper, filed a petition for writ of habeas corpus with the District Court of Okfuskee County, State of Oklahoma, Case No. C-92-44, wherein Respondent claimed that he was denied due process of law when his participation in the Program was revoked without affording him a hearing. The District Court of Okfuskee County denied Respondent's application for writ of habeas corpus on May 19, 1992, finding habeas corpus was not the proper procedure to challenge revocation of PPCS status. Pet. App. at 39a.

B. THE COURT OF CRIMINAL APPEALS.

The Court of Criminal Appeals disagreed with the state district court and held that application for a writ of habeas

corpus is the appropriate remedy when a prisoner contends his confinement is unlawful. Pet. App. at 39a.

The Court directed the Attorney General of the State of Oklahoma to respond stating that, "[w]hen a prisoner is released from prison pursuant to a Preparole Conditional Supervision Program and lives outside institutional facilities, the Due Process Clause vests this person with a liberty interest in remaining in the Program. Therefore, the minimum requirements of Morrissey must be observed before a person can be removed from the Program for a rule or condition violation." The Court then reversed its position and held that "[t]he degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified." Pet. App. at 40a.

The Court, addressing Pardon and Parole Procedure No. 004-11 which became effective some five months after Respondent was returned to prison, held that "[w]e believe such a procedure gives an inmate sufficient notice when he is placed in the Program that he may be removed from it when the governor exercises his discretion and declines to grant parole." Pet. App. at 41a. The Court denied Respondent's petition for writ of habeas corpus April 15, 1993.

C. UNITED STATES DISTRICT COURT.

On October 13, 1993, the Respondent filed a Petition for writ of habeas corpus with the District Court. Again, Respondent claimed that he was denied due process of law when

he was removed from the Program without a hearing. The District Court found that "[a]n inmate on the Program is granted a measure of liberty that lies between that of parolee and that of an inmate incarcerated in prison. A prisoner on the Program enjoys considerable liberty similar to a parolee." Pet. App. at 27a. The District Court refusing to adopt the Eighth Circuit's analysis in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), denied the Respondent any relief. Pet. App. at 32a to 37a.

On February 13, 1995, the District Court filed a Certificate of Probable Cause finding Respondent had made "a substantial showing of the denial of a federal right." The District Court found that Respondent had made a substantial showing that the Tenth Circuit Court of Appeals could resolve the issue in this case differently." The District Court then cited Edwards v. Lockhart. Resp. App. "A".

D. PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS.

The Respondent timely appealed from the District Court's Order denying his petition for writ of habeas corpus. The Court of Appeals reversed the decision of the District Court and remanded with instructions to issue the writ of habeas corpus unless Respondent is reinstated to the Program by the State of Oklahoma. Pet. App. at 14a.

The Court of Appeals held that "[t]he passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the kind of confinement, a transformation that signals the

existence of an inherent liberty interest and necessitates the full panoply of procedural protections outline in Morrissey." Pet. App. at 11a. The Court of Appeals finding no material distinction between the Program addressed in Edwards and that presented here, adopted the sound reasoning of the Eighth Circuit Court of Appeals. Pet. App. at 12a.

The decision of the panel was rendered on August 30, 1995. The Petitioners filed an untimely petition for rehearing and suggestion for rehearing en banc. On September 25, 1995, Opal Carter, Deputy Clerk, entered an Order for the Court granting Petitioners leave to file late petition for rehearing en banc, and Ordered the Respondent to file a response within 20 days from the date of the Order. Resp. App. "B". The Respondent timely filed a response to the late petition for rehearing. On February 13, 1996, the Court of Appeals issued an Order denying rehearing and suggestion for rehearing en banc. Pet. App. at 16a to 17a.

On February 28, 1996, the Court of Appeals issued an amendment to its Order denying rehearing, reflecting that five judges would have granted rehearing. Pet. App. at 18a to 19a.

REASONS FOR DENYING CERTIORARI

A. THE LOWER FEDERAL COURTS ARE UNIFIED ON THE ISSUE THAT INMATES ALREADY PARTICIPATING IN A SUPERVISED RELEASE PROGRAM ARE ENTITLED TO RECEIVE THE PROCEDURAL PROTECTIONS DESCRIBED IN MORRISSEY v. BREWER BEFORE THEY CAN BE REMOVED FROM THAT PROGRAM.

The Petitioners misstate the federal question that properly would be before the Court if certiorari was granted. The issue before this Court is not whether a supervised release program is more similar to parole or minimum security imprisonment, a question which substantially changes the substance of the question presented to the lower court. The question raised in the Court of Appeals, and properly before this Court is whether Respondent acquired a substantial, although conditional, freedom in the Program such that the loss of liberty entailed by its revocation is a serious deprivation requiring that he be accorded due process, and whether due process has been met.

Nothwithstanding the Petitioners' argument to the contrary, a review of the pertinent authorities, the Program here, and the programs addressed in Edwards, 908 F.2d at 302-03; United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991); and Tracy v. Salamack, 572 F.2d 393 (2d Cir. 1978), will reveal that a supervised release program which permits a convict to exist, albeit conditionally, in society on a full-time basis more closely resembles parole or probation than even the more permissive forms of institutional confinement; due process therefore mandates that Program participants receive at least the procedural protections described in Morrissey before inmates already participating in supervised release program may be removed from that program.

This Court has already determined that "[a] liberty

interest inherent in the Constitution arises when a prisoner has acquired a substantial, although conditional, freedom such that 'the loss of liberty entailed [by its revocation] is a serious deprivation requiring that the [prisoner] be accorded due process.'" Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973). The First, Eighth, and Eleventh Circuits have each found independent Constitutional liberty interest where total release from institutional life has been revoked. See: Brennan v. Cunningham, 813 F.2d 1, 5-6 (1st Cir. 1987); Edwards v. Lockhart, 908 F.2d 299, 303 (8th Cir. 1990); and Whitehorn v. Harrelson, 758 F.2d 1416, 1420 (11th Cir. 1985).

This Court also was not persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. This Court held that "[a] simple factual hearing will not interfere with the exercise of discretion." Morrissey, 408 U.S. at 484.

It is well settled that the Due Process Clause shields from arbitrary or capricious deprivation those facets of a convicted criminal's existence that qualify as "liberty interest". See Morrissey v. Brewer, 408 U.S. 471 (1972); Hewitt v. Helms, 459 U.S. 460 (1983). The Court of Appeals determined that "the liberty interest associated with life outside the walls of a penal facility dwarfs that available to an inmate." Furthermore, the Court of Appeals held that "[i]t is the ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate

authority of guards or warden" that signals the existence of an inherent interest. Pet. App. at 10a to 11a. Those in the Program enjoy the benefits and joys of gainful employment, the company of family and friends, and the pursuit of other enduring attachments of normal life.

There being no material distinction between the Program addressed here and in the other circuits, the Court should deny certiorari to review the Court of Appeals decision finding inherent liberty interest in continued placement in supervised release program that allowed convicts to live and work in society. This finding directly conforms with the finding of the other circuits.

Furthermore, the record conclusively demonstrates that Respondent received no prior written notice of revocation; no subsequent hearing or other opportunity to offer evidence, rebut arguments made against him, or argue on his own behalf; and, no meaningful explanation to the reasons for his termination from the Program. In sum, the record supports the conclusion that Respondent received no process at all before he was deprived of the freedom he had acquired in the Program.

B. THE COURT OF APPEALS DID NOT DECIDE THE ISSUE IN A MANNER WHICH CONFLICTS WITH THE DECISION OF THE COURT OF CRIMINAL APPEALS, THE STATE COURT OF LAST RESORT, ON THE SAME IMPORTANT MATTER.

As stated above, the Court of Criminal Appeals, in the Order directing response, concluded that, the Due Process Clause of the Fourteenth Amendment vests Program

participants with a liberty interest in remaining in the Program. Even in its Order denying Respondent's petition for writ of habeas corpus, the Court of Criminal Appeals held that "[t]he degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified. Pet. App. at 40a. Clearly the Court of Criminal Appeals found that before removal from the Program the participant should be afforded some sort of procedural protections. The findings of the Court of Criminal Appeals is in accord with the Court of Criminal Appeals.

Respondent received none of the procedural safeguards required by Morrissey and was not even afforded the less comprehensive process deemed necessary by the Court of Criminal Appeals. In light of the Court of Criminal Appeals finding that Program participants cannot be subject to deprivation without adherence to some procedural safeguards, it cannot be reasonable argued that the decision of the Court of Appeals is in conflict with the decision of the Court of Criminal Appeals when it defines the procedural safeguards that must be met.

C. PROGRAM PARTICIPANTS' STATUS IN THE PROGRAM IS ANALOGOUS TO PAROLEES ON PAROLE; THEREFORE THEY SHOULD BE TREATED THE SAME, AS A MATTER OF LAW AND AS A MATTER OF FAIRNESS.

This Court defined parole in Morrissey v. Brewer, that definition should be consulted when comparing the two programs. Parole programs release inmates from incarceration

to the community and require participants to be subject to a number of specified conditions while on parole. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically also, they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolee must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Morrissey, 408 U.S. at 478.

The Program also release inmates from incarceration to the community and require participants to be subject to a number of specified conditions to while on the Program. Those in the Program work and reside beyond the confines of a state penal institution and are thus free to enjoy most of the benefits of a normal existence. In return, a program participant must agree to abide by restrictions similar to those placed upon a parolee. He may be searched or visited at any time by his parole officer; must complete an itinerary for the next week's activities; must seek permission from his parole officer before engaging in specified activities, such as changing residence, marrying, acquiring or operating a

motor vehicle; cannot travel freely and may be subject to a curfew; cannot use drugs or alcohol or visit locations where those substances are likely to be present; may be urine-tested at any time; must pay monthly fees to the Department of Corrections; and may not assume debt or apply for public assistance without permission. Violation of a condition may result in termination from the Program and reincarceration. The Petitioners admit that Respondent violated none of these prohibitions.

While the Program has some differences from a parole program; both involve release of inmates from incarceration. Admittedly, the Program involves a greater degree of supervision than parole, requiring its participants to meet more often with their parole officers and to maintain gainful employment or to pursue a study program, as well as mandating other significant reporting and supervision requirements imposed by the State. Nevertheless, under the Program, Respondent lived completely outside an institutional setting.

Certainly, Respondent is subject to more constraints in the Program than he would if on parole. The constraints applied to the Respondent serve to guide him in the outside world, not, as the Petitioners argue, to confine him to the equivalent of institutional life. Both programs are sufficiently similar, in light of Morrissey, to conclude that the due process clause vests Respondent with a liberty interest, and that due process had not been met before he was terminated from the Program.

CONCLUSION

For the reasons stated above, the Respondent, Ernest Eugene Harper respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari.

Ernest E. Harper

Ernest Eugene Harper, #260 SE
Route 1 Box 8
Helena, OK 73741-9606

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

_____

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA -- PETITIONERS

VS.

ERNEST EUGENE HARPER -- RESPONDENT

_____

PROOF OF SERVICE

I, ERNEST EUGENE HARPER, do swear or declare that on this date, 4-17-96, 1996, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Jennifer B. Miller
Office of the Attorney General, Oklahoma
2300 N. Lincoln Blvd., Suite 112
Oklahoma City, Oklahoma 73105-4894

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 1996.

Ernest Harper
ERNEST EUGENE HARPER

APPENDIX

Appendix "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 13 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ERNEST EUGENE HARPER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 93-C-948-B
	)	
LEROY L. YOUNG,	)	
	)	
Respondent.	)	

CERTIFICATE OF PROBABLE CAUSE

Before the Court is Petitioner's notice of appeal and request for a certificate of probable cause and leave to proceed on appeal in forma pauperis, filed on February 6, 1995. Petitioner desires to appeal the decision and order of this Court denying his petition for a writ of habeas corpus entered on January 10, 1995. The Petitioner is proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

After carefully considering the record in this case, the Court concludes that a certificate of probable cause should issue in this case. Petitioner has made a subscantial showing that the Tenth Circuit Court of Appeals could resolve the issue in this case differently. See Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990). Determining that Petitioner raises issues that are debatable, the Court grants the application.

ACCORDINGLY, IT IS HEREBY ORDERED that a certificate of probable cause (doc. #16) is **granted**, Fed. R. App. P. 22(b), and that Petitioner's motion for leave to proceed in forma pauperis on appeal (doc. #16) is **denied as moot** because the Petitioner has been proceeding in forma pauperis since the inception of this suit.

SO ORDERED THIS 13 day of Feb., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERNEST EUGENE HARPER, Petitioner - Appellant,	)	
v.	)	No. 95-5026
LEROY L. YOUNG, and ATTORNEY GENERAL OF OKLAHOMA, Respondent - Appellee.	)	

ORDER

Filed September 25, 1995

Before SEYMOUR, Chief Judge, McKAY, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE and LUCERO, Circuit Judges.

The court grants appellees leave to file a late petition for rehearing and suggestion for rehearing en banc.

Appellant shall file a response to the petition for rehearing and suggestion for rehearing en banc within 20 days from the date of this order.

Entered for the Court

PATRICK FISHER, Clerk

By: Opal A. Carter
Opal Carter, Deputy Clerk